SECTION 29 (1) OF THE GENERAL LAW AMENDMENT ACT, No. 101 OF 1969 AND THE LAW AS IT WAS ON THE 30th MAY, 1961

An Inaugural Lecture
given in the University of Fort Hare
on the 14th November, 1969.

by

J. B. THOM

Professor of Criminal Law and Procedure

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SECTION 29(1) OF THE GENERAL LAW AMENDMENT ACT, NO. 101 OF 1969 AND THE LAW AS IT WAS ON THE 30TH MAY, 1961.[1]

Lawyers, academicians, social reformers, moralists and others throughout the country, have contributed to the current controversy regarding the provisions of Section 29(1), otherwise referred to as forming part of BOSS, which is an abbreviation of the *Bureau of State Security*.

As a contributor, I must, at the outset, explain my position. Do I speak also as a moralist and a social reformer?

Professor S. A. Strauss was reported to have said the following:[2]

> "In general terms, the function of lawyers may be defined as follows: 'Law is not made by lawyers. The primary function of the lawyer is to state what the law is, to interpret and to explain it. It the making or shaping of the law, the lawyer himself plays an indirect role only.
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> He may be a member of the legislature, bringing his influence to bear upon a proposed amendment of the law. As a judge he may within the confines of the principles of *judicis est jus dicere sed non dare* and *stare decisis* fill a gap in the law, or occasionally, in a liberal interpretation of these principles, may be bold enough to break away from an established rule and create a new precedent.
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> As an academic jurist he may argue convincingly in favour of a new proposition and may on occasion inspire the legislature or a court to follow his lead.

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[1]This is an inaugural address which was delivered on 14th November, 1969. The Publications Committee, University of Fort Hare, has granted permission for its publication in *Speculum Juris*.
Its publication is belated on account of the regulations governing Judicial Commissions, and also in order that it may now, hopefully, receive a rational appraisal.

[2]In an article: *Therapeutic Abortion and South African Law,* S.A.L.J., 1968, p.453.

Or he may simply as a member of society take the initiative in reforming the law...When a lawyer attempts to assume the role of creator of the law, he must fail because he can never be more than the high priest of the law...' "

As long ago as 449 B.C. the Romans, in their codification, distinguished between *ius* and *fas*—law and religion.

While, at the present day, there remains some interdependence and correlation between law and religion, members of the clergy do not make good lawyers and members of the legal profession make equally bad clergymen.

Law has indeed reached maturity and is no longer practised under the auspices or at the pleasure of the Church.

One must therefore agree with the following remarks of Mr. Justice Kotze, made in 1915:[3]

"Courts of law certainly discountenance anything immoral, but there are some acts of an immoral nature which they cannot reach and punish. We do not possess the power of creating offences, upon the ground that, in our opinion, they are contrary to good morals".

If, therefore, a lawyer is a moralist, or a social reformer, it is not necessarily, or naturally, attributable to his lawyership. The point I wish to make, is that lawyers are not enjoined by the tenets of their profession to be moralists or social reformers; occupational hazards reserved, more particularly, for members of the clergy, with the possible exception of the Lutherans, or so I have been given to understand! A member of the clergy would therefore be guilty of serious hypocrisy if he were to expect of his congregation to do as he says, and not to do as he does. For a lawyer it is sufficient to know the law, and if he does not, then to know where to find it.

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[3] *R.v.M.,* 1915 C.P.D. 334, p.340.

I am a lawyer and I speak as such. I have no serious pretentions.

This brings me to the real point of departure of this evening's address, namely, a tea party. I do not intend any discussion of local tea parties, since they are very demure, and not a word of gossip is exchanged! But your attention is invited to a tea party organized by a branch of the Women's Agricultural Union, to which Mr. Justice Kowie Marais was invited. The invitation required of him to address the gathering regarding his experiences on the Criminal Bench. It was on this occasion that Mr. Justice Marais saw fit to launch an attack on Section 29, Parliament and the Executive. The aforesaid Women's branch of the Agricultural Union was quick to point out publicly that Mr Justice Marais had abused the occasion and used it as a platform for an attack on Parliament and the Executive. Mr Justice Marais apologised publicly. This provided the basis for a public controversy in the Press, with a few judges, some Law Faculties, attorneys, advocates, members of Parliament and newspaper editors joining in the debate vociferously, and, of course, with Margaret Smith of the *Sunday Times* having a really jolly time! So much noise was made that it was picked up and broadcast by the Voice of America during the landing on the moon!

In the *Sunday Times* of July 13, 1969, Professor H. L. Swanepoel was reported to have stated that:

> "(It) is not only the right of a judge to criticise a law he thinks is bad, but it is also his duty. Judges often criticise a law from the bench. When they said a law was vague or *ultra vires* this sometimes led to Parliament changing the law."

Whether these statements should be attributed to Professor Swanepoel or Margaret Smith, is hard to say, but they are, in any event, inaccurate and unacceptable. Members of the South African judiciary cannot declare enactments of Parliament void for being vague or *ultra vires*, since this is possible only in cases of subordinate legislation, such as regulations of local authorities. The

only exception is the procedural entrenchment provided for in Section 59(2) of the South Africa Act, which is, for the present purpose, irrelevant.

On the 19th July, 1969, Mr I. M. Rautenbach and the present speaker published, inter alia, the following views in the *Daily Dispatch*:

"Section 29 is neither vague nor may such a provision be regarded as being *ultra vires*, In fact, its terms are very clear, and if, therefore, it is to be regarded as being 'bad' law, it can be bad only in the sense of being immoral, harsh or presumably unwise, but it certainly is not bad in the sense in which the Cape Judge allegedly considered the Population Registration Act to be bad, or in the sense that, from a point of view of implementation, it is unintelligible. It can be bad therefore only from a policy point of view, and this, it is respectfully submitted, falls clearly outside the intended functions of a judge, and not without good reason, since participation by judges in debates of this nature tends to detract from the objectivity which is expected by the public of members of the judiciary. The point becomes clear when regard is had to the circumstance that we have, after all, written into our statutory law, legal measures of a very much more far-reaching effect than Section 29(1) or which, conceivably, could be so regarded.

While we do not, for a moment, deny a judge an opinion on matters such as Section 29(1), we do hold the firm, and, we believe, reasonable view, that if such an opinion concerns policy, and especially policy of the nature in question, it should not find expression in a debate conducted in the Press, since such debate must, necessarily, be controversial. Conduct, such as this, could, obviously, give rise to a profitless constitutional hiatus.

With reluctance, and respect, we cannot therefore agree with the defence by Professor Swanepoel of Mr Justice Marais' criticism as reported in the *Sunday Times*."

On the 2nd August, 1969, in the *Daily Dispatch*, Dr. W. H. Dean criticised our point of view, but could not avoid reference to Mr Justice Marais' conduct. He described the Judge's action as bordering on the improper and smacking of barnstorming. Dr. Dean went on to quote Lord Denning as having said that a judge should not "enter into a captious and irresponsible criticism of what Parliament has done" for that would show a "want of confidence in Parliament which it is undesirable to express."

Since a few judges—two retired—came out in criticism against Section 29(1), one would like to know whether all the other members of the judiciary who have preferred to remain aloof, have shirked their duty?

In the 1968 edition of the Fort Hare law magazine, *Speculum Juris*, Mr Justice G. P. C. Kotze was reported to have expressed the following views on the function of judges:[4]

> "I would like to conclude by making a few observations on indirect law-making by Judges. This happens when the Courts influence a change of law by criticising the existing state of the law, more specifically in the field of legislation. This is something that does not occur frequently. If it did one could imagine that friction might be engendered between the judicial and legislative organs of the State. But responsible criticism of legislation may not only be desirable but might sometimes be essential. I believe that responsible criticism of legislation will always be welcomed by the executive and by the legislature. In dealing with judicial comment on Acts of Parliament Sir Alfred Denning wrote as follows in Vol. 9 (1951) *Canadian Bar Review,* p.1194:
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> > 'The true principle, as I understand it, is that judges are entitled to make responsible comments or suggestions on the way in which Acts work if it appears to them necessary to do so in the public interest. This applies not only in respect of enact-

[4] *Aspects of the Judicial Office,* p.35, at p.41.

ments in ancient times but also in respect of enactments in modern times, subject to the qualification that judges must never comment in disparaging terms on the policy of Parliament, for that would be to cast reflections on the wisdom of Parliament and would be inconsistent with the confidence and respect which should subsist between Parliament and the judges. Just as members of Parliament must not cast reflections on the judges so judges must not cast reflections on the conduct of Parliament. If everyone observes these rules, there will be no conflict.' "

It is submitted, with respect, but nevertheless confidently, that criticism of Parliamentary legislation by a judge from a lectern at a tea party is definitely not to be classified as falling within the confines drawn by Mr Justice Kotze and Lord Denning.

Having provided you with some idea of the functions of lawyers and judges, I shall now outline, realistically, the background against which the criticism levelled against Section 29(1) may be, more properly, evaluated.

Section 29(1) provides as follows:

"Notwithstanding anything to the contrary in any law or the common law contained, no person shall be compellable and no person shall be permitted or ordered to give evidence or to furnish any information in any proceedings in any court of law or before any body or institution established by or under any law, as to any fact, matter or thing or as to any communication made to or by such person, and no book or document shall be produced in any such proceedings, if a certificate purporting to have been signed by the Prime Minister or any person authorized thereto by him or purporting to have been signed by any other Minister is produced to the court of law, body or institution concerned, as the case may be, to the effect that the said fact, matter, thing, communication, book or document affects the interests of the State or public security and that the disclosure thereof will, in the opinion of the Prime Minister or the said person so

authorized or other Minister as the case may be, be prejudicial to the interests of the State or public security."

The effect of Section 29(1) is that the Prime Minister, or any official authorized thereto by him, or any other Minister may issue a certificate prohibiting the production in court, or in any other tribunal or proceedings, of evidence if in the opinion of the person issuing the certificate, the production of such evidence could be prejudicial to the interests of the State or public security.

To evaluate, in detail, all the statements made by judges, lawyers, lecturers and others, against Section 29(1), will not be possible in the time allotted for the address. I propose therefore, to refer only to such criticism as would, on the face of it, appear to be viable.

Mr Justice de Wet, retired Judge President of the Transvaal, expressed the view that Section 29(1) could lead to unfairness, especially in civil trials, where, normally, one of the litigants must lose.

Mr Justice van der Riet (retired) pointed out that any law curtailing the judicial discretion must be criticised.

Professor P. van Warmelo[5] warned against abuse of powers by officials.

Professor W. J. Hosten[6] stated that while, in the past, it was within the Courts' discretion to decide whether a reliance on privilege was in the State or public interest, Section 29(1) has deprived the judiciary of this function. He pointed out also that to issue a certificate in terms of Section 29(1) would mean that Courts of law would have to decide the issues without having all the evidence before them.

Professor Anthony Mathews[7] stated that accused persons in criminal trials could find themselves in a position where they will not be permitted to adduce evidence which might prove their innocence, a statement made also by three members of the Faculty of Law of the newly established Afrikaans University in Johannesburg.

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[5]Faculty of Law, University of Pretoria.
[6]Faculty of Law, University of South Africa.
[7]Faculty of Law, University of Natal.

In sum therefore, it is considered by those who are critical of Section 29(1) that there has been serious interference by the law-makers in the traditional discretion of courts regarding State privilege in the field of the concept of admission of evidence. It is their opinion also that Section 29(1) goes much further than was the position prior to the promulgation of this section; moreover, that accused persons in criminal trials could be detrimentally affected, in that they could find themselves in a position where they would be prohibited from adducing evidence as to their innocence, also that Section 29(1) could have an adverse and unfair effect in civil trials. It was their opinion also that there could be abuse by State officials.

In support of these views reliance was placed upon the judgment delivered by the Appellate Division in *Van der Linde v.* Calitz,[8] which I shall discuss after dealing with the law as it was prior to the judgment given in this case.

Since this is a matter related to the law of evidence, the authoritative literature on evidence has to be consulted. Textbooks, it is submitted, are such a source.

HOFFMANN[9] explains the relevant law as follows:

> "This chapter is concerned with evidence which is excluded because its reception would be contrary to some aspect of public policy. For example, the need for secrecy in state affairs may occasionally override the claims of individual justice. In the leading case of *Duncan v. Cammell, Laird & Co. Ltd.,* (1942) A.C. 624, at p.643; (1942) 1 All E.R. 587, at pp.595-596, Viscount Simon ended his speech by saying:
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> 'After all, the public interest is also the interest of every subject of the realm, and while, in these exceptional cases, the private citizen may seem to be denied what is to his immediate advantage, he, like the rest of us, would suffer if the needs of protecting the interests of the country as a whole were not ranked as a prior obligation.'[10]

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[8] 1967(2) S.A. 239 (A.D.)
[9] Hoffmann, L. H., *South African Law of Evidence* (1963).
[10] p.261.

"In all these cases, the court has to resolve a conflict between the needs of justice—itself one of the most important facets of the public interest—and other considerations of policy. This clash of interest is often of great constitutional importance, and can create difficult problems and acute public controversy.

"There are general provisions in the Criminal Procedure Act (Section 233) and the colonial evidence statutes which require that the exclusion of evidence on grounds of public policy must be governed by English law...[11]

"The scope of the exclusionary rule cannot be defined more precisely than by saying that evidence will not be admitted when its disclosure would be contrary to state interest. The cases on the subject reveal various kinds of state interest which the courts have conceded to warrant the exclusion of evidence, but in practice a great deal will depend upon whether or not objection is taken by a Minister of State. In such a case the court is ordinarily bound to accept the Minister's opinion that the evidence should not be divulged.[12]

"In a civil action the affidavit or certificate of the head of a government department, certifying that the disclosure of a document would be contrary to the interests of state, is ordinarily conclusive. This rule was adopted as a correct expression of English law by the Transvaal Provincial Division in *Barnicott v. Minister of Justice* (1913 T.P.D. 691) a view which has since been confirmed by the decision of the House of Lords in *Duncan v. Cammell, Laird & Co., Ltd.*

"The political head of the department will usually be the only person whose opinion the court will treat as final, although in cases in which it is not practicable for him to act, the court may accept the certificate of the permanent head.[13]

"A document may be withheld on grounds of public interest either because of information which it

[11] *Ibid.*
[12] *Ibid.*, p.262.
[13] *Ibid.*, p.263.

actually contains, or else because it belongs to a class of documents which ought not to be disclosed. The submarine plans in *Duncan v. Cammell, Laird & Co., Ltd.,* illustrate the first kind of reason; the second arose in *Nyangeni v. Minister of Bantu Administration and Development* (1961 (1) S.A. 547 (E), in which the Minister objected to the admission of minutes of a cabinet meeting on the ground that it would be contrary to public policy for cabinet minutes generally to be made public, quite apart from anything which a particular minute happened to contain.

"Once the Minister has certified in proper form that for one or other of these reasons the document should not be disclosed, the court is not permitted to inspect it in order to ascertain whether the Minister could reasonably have formed such an opinion.[14]

"In *Barnicott v. Minister of Justice,* for example, the plaintiff was a prisoner who had been assaulted in gaol by another prisoner suffering from some form of mental derangement. He alleged that the prison officials had been negligent in not keeping his attacker under proper control when they knew of his violent tendencies. In order to establish this knowledge, he applied for discovery of medical reports which contained details of the prison doctors' examinations of the other prisoner during the time that he had been in custody. Objection was made by the Minister on the grounds of public interest, and the court conceded with some reluctance that it could not question the Minister's opinion.[15]

"In *Barnicott v. Minister of Justice,* it was said that the Minister's decision could be overruled only on the ground that it was "frivolous or vexatious..."[16]

SCOBLE[17] says:

"Documents and communications respecting matters of State are protected from disclosure whenever it

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[14]*Ibid.*, p.263-264.
[15]*Ibid.*, p.264.
[16]*Ibid.*, p.265.
[17]Scoble, C. N., *The Law of Evidence in South Africa* (1945).

would be injurious to public or State interests to reveal their contents (*Barnicott v. Minister for Justice,* (1913) T.P.D. 691; *Rex v. Anglia* (1918) N.P.D. 147.)[18]

"So punctilious are the courts in regard to the disclosure of State secrets that, even where the officer of State or the opposing party does not claim protection, they will interpose and prevent the evidence being admitted (*Tranter v. Attorney-General,* (1907) T.S. 515; *Chatterton v. Secretary of State,* (1895) 2 Q.B. 189).[19]

"Unless the court finds that his objection is frivolous, or vexatious, or not made in good faith, the Minister to whose department the document belongs, or the head of the department in whose custody it is, is the exclusive judge as to whether such document is to be protected from disclosure on the ground of State policy or not (*Barnicott v. Minister for Justice,* (1913) T.P.D. 691; *Sachs v. Minister for Justice,* (1933)T.P.D. 157, and (1934 A.D. 11). In the latter case, the applicant sought to obtain the disclosure of a document on which the Minister had acted in ordering the banishment of a communist, but Wessels, J., said:

> 'Where a head of a public department refuses in his affidavit of discovery to disclose certain correspondence and documents on the grounds that they are official communications made in pursuance of public policy or detrimental to the public interest or service, the court will, in the absence of proof that the refusal is frivolous or vexatious, not go behind it.'

See also the remarks of Tindall, J.:

> 'The Minister's decision that the disclosure will be detrimental to public policy is final unless it can be shown that he did not arrive at his opinion in good faith or that he did not seriously apply his mind to the question.' "[20]

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[18] p.281.
[19] *Ibid.*, p.282.
[20] *Ibid.*, p.282-283.

MAY[21] says:

" 'It is the practice of the Court to accept the affidavit of (a Minister)...that the production of certain documents would be against the public interest and neither to order their production in the action nor to have them produced to the court for it to form an opinion whether the view expressed by the Minister is correct'—from the headnote in *Duncan v. Cammell Laird & Co. Ltd.,* (1941) 1 K.B. 640 (C.A.)

EX PARTE ZELTER, 1951(2) S.A. 54 (S.R.)

"Where in an application for naturalization a Commissioner of Police had stated in his report that he was unable to recommend the application for reasons which the Minister of Justice certified he could not disclose without prejudice to security sources of information, it was held that the reasons need not be disclosed.

"Beadle, J., at 57: 'In *Duncan v. Cammell, Laird & Co. Ltd.,* (1942) A.C. 624 (H.L.) Viscount Simon states: 'The approved practice...is to treat a ministerial objection taken in proper form as conclusive...' Pollock, C.B. in *Beatson v. Skene,* 29 L.J. Ex 430, states: 'We are of the opinion that, if the production of a State paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a court of justice; and the question then arises, how is this to be determined?...(It) must be determined, not by the judge, but by the head of the department having the custody of the paper; and if he...states that in his opinion the production of the document would be injurious to the public service, we think the judge ought not to compel the production of it. The administration of justice is only a part of the general conduct of the affairs of any state or nation, and we think it is (with respect to the production or non-production of a state paper in a court of justice) subordinate to the general welfare of the community.'

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[21]May, H. J., *South African Cases and Statutes on Evidence* (1962).

'It is clear, therefore, that it is not for this Court to decide what...evidence is or is not privileged from production on the ground of public policy. Once the court is satisfied that the objection to producing the evidence has been taken in proper form, it must uphold that objection. I think in a case such as this, the proper form would be for the Minister responsible for the administration of this particular measure to put in an affidavit stating that...he was satisfied on the ground of public policy that the (document)...could not be disclosed without prejudice to the security sources of information. If the court were satisfied that such an affidavit was authentic, then the court must accept that affidavit...' "[22]

HIEMSTRA[23] states:

"Staatsbelang dek elke dokument waarvan die openbaarmaking skadelik vir die openbare belang sou wees, hetsy vanwëë die aard van die enkele dokument, of omdat dit behoort tot 'n klas van dokumente wat binne die bedoelde kategorie val. Dit is geen grond vir bevoorregting dat die dokument bloot vertroulik of amptelik is nie. Die aanspraak op bevoorregting moet gemaak word deur die betrokke Minister of in besondere omstandighede kan dit ook gemaak word deur die hoof van die betrokke Departement. Dit moet onder eed gedoen word, nadat hy die betrokke dokument gesien en oorweeg het en self die mening gevorm het dat op gronde van openbare belang dit nie geopenbaar mag word nie. Behalwe waar die dokument uiteraard klaarblyklik bevoorreg is, moet die aanspraak nie alleen die aard van die dokument beskryf nie, of die aard van die klas van dokumente waartoe dit behoort nie, maar ook die redes vir die aanspraak op bevoorregting, d.w.s. die Minister moet aantoon in watter opsig die openbare belang benadeel sal word. Die hof kan die beswaar teen voorlegging van die stuk afwys en kan vir die doel van die beslissing die dokument opeis en privaat inspekteer, behalwe waar dit van so

[22]p.266.
[23]Hiemstra, V. G., *Die Suid-Afrikaanse Strafproses*, p.281-282.

'n aard is dat voorlegging daarvan die landsveiligheid of goeie diplomatieke betrekkinge kan skaad. Hierdie uiteensetting van die posisie word gegee in *S. v. Naicker and Another*, 1965 (2) S.A. 919 (N) waarin die Natalse Provinsiale Afdeling afgewyk het van vroeëre sake waarin die sertifikaat van die Minister as afdoende beskou is. Die saak bevat 'n volledige opsomming van voorafgaande beslissings oor die onderwerp. Die Vrystaatse Provinsiale Afdeling het in *Van der Linde v. Calitz,* 1966 (3) S.A. 797, beslis dat die hof geen mag het om, as die hoofde van die provinsiale administrasie weier, 'n dokument op te eis nie tensy die redes vir weiering beuselagtig of kwelsugtig is."

FERREIRA[24] says:

"Die reël is dat staatsake teen openbaarmaking beskerm word as dit in die openbare belang of in belang van die Staat is dat hulle nie bekend gemaak word nie. Die Minister van die staatsdepartement moet op hierdie privilegie aanspraak maak by wyse van 'n sertifikaat of beëdigde verklaring dat openbaarmaking van die inligting teen openbare of staatsbelang is. Alhoewel die hof mag weier om die privilegie toe te laat, sal dit nie maklik geskied nie, tensy bewys is dat die Minister se weiering kwaadwillig of beuselagtig is, of dat hy nie die aangeleentheid behoorlik oorweeg het nie."

GARDINER AND LANSDOWN[25] say:

"Secrets of State, confidential State documents, and communications between the Government and its officers, if it be made to appear to the court that important interests of the State would be prejudiced by their publication by means of evidence, will not be ordered to be disclosed—*Anglia v. R.,* 1918 N.P.D. 147. That the information in question is of this character is usually conveyed to the court by the head of the Government department concerned, whose statement

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[24]Ferreira, J. C., *Strafprosesreg in die Landdroshof*, p.360.
[25]*South African Criminal Law and Procedure,* 6th Ed.

that disclosure would be contrary to public policy and detrimental to the public interests, while not conclusive of the matter, will be accepted by the court in the absence of proof that these reasons are frivolous or vexatious.[26]

"In South Africa, courts will not readily go behind the statement of a Minister or secretary of a State department; but it is submitted that the court would have power to do so in any case in which it appeared that the objection was either frivolous or vexatious, or that the mind of the Minister or secretary had not been addressed to the matter."[27]

Reference will now be made to leading English and American textbooks on Evidence.

NOKES[28] says:

"*Scope of the privilege.* The principle underlying this Crown privilege is that disclosure of some official information would be injurious to the interests of the state. Clearly the disclosure of a plan to meet an invasion in time of war would fall within this principle, as involving danger to the realm. But there are many less obvious injuries to the state, including apparently the disclosure of matters related to international diplomacy. Further, it has been recognised that an injury to the public service may be caused by the prospect of disclosure which hampers the freedom of officials to communicate unreservedly with each other.

"It is thus clear that the scope of the privilege is wide, as may be demonstrated by a few illustrations. It has been held to cover reports on the conduct of officers and other in the Army, on railway accidents made to the Ministry of Transport, and on a person detained under the Defence Regulations; communications between a Governor and the Secretary of State for the Colonies, and between a Minister and his Parliamentary Under-Secretary; Army medical sheets, and a company's balance-sheets in the posse-

[26]p.520-521.
[27]*Ibid.*, p.522.
[28]Nokes, G. D., *An Introduction to Evidence* (1962).

ssion of the Income Tax authorities; an early statement by a witness, because it was connected with a police report of an assault in a prison, and police reports themselves.

"The privilege extends to a class of documents, and there is statutory power to make rules preventing disclosure even of the existence of a document.

"Protests against the abuse of the privilege a few years ago led to the Lord Chancellor announcing a limitation upon claims to privilege, but such administrative instructions cannot provide any legal restriction of the right—once it is claimed in litigation. As will shortly appear, some attempts to establish exceptions to the privilege have proved unsuccessful."[29]

"*Duncan v. Cammell, Laird & Co. Ltd.*, was an appeal in consolidation actions for negligence by the widows of two men who perished in the disaster to the submarine Thetis, brought against the constructors and others. They were in touch with the Admiralty while trial was pending, and the First Lord of the Admiralty made an affidavit in opposition to discovery of documents relating to details of construction. This was held sufficient to support the privilege by the House of Lords, who reveiewed the authorities and considered the general position. They decided that the statement of the Minister should be accepted as final; disapproving the view, which had been expressed by a number of other courts, including the Privy Council, that the judge might inspect the documents to form his own opinion. So that, however reluctant the courts may be to endorse the opinion of the Minister, they must usually give effect to it. In Scotland, however, the courts have not surrendered their discretion."[30]

PHIPSON[31] says:

"Affairs of State. Witnesses may not be asked, and will not be allowed, to state facts or to produce do-

[29]p.180-181.
[30]*Ibid.*, p.184.
[31]Phipson, S. L., *The Law of Evidence* (1921).

cuments, the disclosure of which would be prejudicial to the public service. And this exclusion is not confined to official communications or documents, but extends to all others likely to prejudice the public interest (*Asiatic Petroleum Co. v. Anglo-Persian Co.*, (1916) 1 K.B. 822), even when relating to commerical matters (*Isaacs v. Cook*, (1925) 2 K.B. 391). Thus, a Minister may not be asked the grounds on which a prisoner received the pardon (*R. v. Cobbett*, 2 St. Tr. (N.S.) 873); nor whether a defendant's advice as to measures to stop disturbances throughout the kingdom was not salutory (id. 877).[32]

"Objections to the disclosure of such matter may be taken on oath by the head of the department, either orally or by affidavit...or by a subordinate, or counsel instructed by him to object...or by the party interested in excluding the evidence; or by the Judge himself... Where the head of the department, by person or proxy, objects, the Judge will not compel the production, nor decide upon the validity of the objection, unless it is a palpably futile one..."[33]

WILGMORE[34] states:

"Eliminating the foregoing principles, is there still a genuine testimonial privilege which is to protect public officers from the disclosure of certain kinds of facts or communications received through their official duties? Some such privilege undoubtedly exists. But the scope of that privilege has not yet been defined with certainty.

"The precedents fall into three topical divisions, dealing with (1) official acts and communications which may be the basis of substantive liability, (2) secrets of state and (3) materials relating to the internal management and functions of government.

"1. *Official acts and communications which may be the basis of substantive liability.* (a) In actions against an official for defamation contained in an official

[32]p.194.
[33]*Ibid.*, p.195.
[34]*Wigmore on Evidence,* Vol. VIII, 1961, p.792-799.

report, several British rulings privilege the defendant from producing the defamatory writing. This has the practical effect of exonerating the official from liability by refusing the means of proof. (b) In actions against officials for other kinds of wrong done to the plaintiff by official acts, several similar precedents have protected the defendant from disclosure of his acts or his written admissions—thus again indirectly effecting his exoneration in substantive law by refusing the means of proof. (c) To these must be added the rulings refusing to compel disclosure of the votes or speeches of a member of the House of Commons or of Congress, or to compel disclosure of the proceedings of the House of Commons. The former is in effect (like the rulings in libel actions) virtually an indirect enforcement of the member's non-liability for his utterances, and the latter rests merely on a traditional fiction of secrecy once much cherished by the British House.

2. *Secrets of state.* There are occasional precedents applying the testimonial privilege for secrets of state, the scope of which is limited to nondisclosure of matters relating to international relations, military affairs and public security, and the existence of which has never been doubted.

This common law privilege, with respect to secrets in some sensitive areas, sometimes may be found in statutes.

3. *Materials relating to internal management and functions of government.* Whether a privilege may be asserted for information and materials in the possession of government agencies and departments solely on the ground of their "governmental" character is a question which has received much recent consideration. The circumstances in which this issue arises often resemble those in which other privileges are claimed and restrictions on disclosure imposed—e.g., the rule prohibiting discovery of the "work product" of an attorney and prosecutor, the privileges accorded to encourage communications of various kinds by citizens to government and the privilege for secrets of state.

Related by analogy, especially in the case of regualtory agencies, are the privileges for communications to and among grand jurors and for communications among and motives of triers of fact. And finally, involved as a practical matter (and to the embarrassment of the courts), are the inadequately defined privileges of the executive with regard to judicial process and testimonial obligation—privileges which, to the extent that they exist, are as much a concession to power as to policy.

Is there a distinct privilege recognized today for "official information"—not qualifying as secrets of state—the disclosure of which would be injurious to the government?

(a) Such a privilege clearly exists where it is declared expressly by *statute*."

Cross[35] traces the development of the law in England up to the end of September, 1957.

He says:

"The history of the Courts' treatment of this question can be divided into three periods—the decisions down to 1931 when the Judicial Committee delivered their advice in *Robinson v. State of South Australia,* the decisions between 1931 and 1942 when the House of Lords gave judgment in *Duncan v. Cammell Laird* which substantially settles the present English law on the subject and the decisions since 1942.[36]

"The judgment in *Duncan v. Cammell Laird & Co., Ltd.,* has been described as 'an abdication by the Courts of their proper function of determining what is admissible or inadmissible evidence'. This criticism may be misconceived when the Minister's decision to exclude the evidence is based on the view that its reception might endanger national security, for there is great force in the suggestion that such a question must be decided by the executive as the responsible body, but the implications of the judgment have caused widespread concern in cases in which the Minister has

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[35] Cross, R., *Evidence*, (1958.)
[36] p.251.

claimed that the evidence ought to be excluded because its reception might endanger some public interest other than that of national security. In *Ellis v. The Home Office*, for instance, where the Home Secretary claimed to exclude medical and police reports concerning the conduct of a prisoner awaiting trial, the Court of Appeal stressed the desirability of the presence in Court of some representative of the relevant Ministry in a case in which the objection was founded on the fact that the document belonged to a class which ought to be kept secret, but there has been no suggestion that an English Court can overrule the Minister's claim to exclude documentary evidence."[37]

Mr. Rector, I wish, at this stage, to give a summary of what has gone before, and to draw a few conclusions.

We have seen that from as early as 1895 an objection on the basis of state privilege was already known to English law. Obviously, therefore it was *possible*—long before the enacting of Section 29(1) of Act 101 of 1969—that an accused person in a criminal trial could have found himself in a position where he would not have been permitted to adduce evidence which might have proved his innocence. It is nothing new; and, in any event, it stands to reason that a court would discharge an accused in such circumstances, so much more so if the court does not know the nature of the evidence to which objection is made and excluded.

Similarly, the fact that a civil litigant could lose in such circumstances is not part of recent experience only. It is as possible at the present day as it was in 1931.

That there could be abuse by officials to whom the authority to object, may be delegated, is, it is submitted, perhaps a point well taken.[38]

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[37]*Ibid.*, p.254.

[38]However, in this regard sight must not be lost of the circumstance that prior to Section 29(1) the political Head or administrative Head of a Department could, in certain circumstances, object to the admission of evidence. In terms of the aforesaid Section a Head of a Department may object only when such authority has been delegated to him by the Prime Minister. It, of course, goes further in this respect that such authority could also be delegated to any official other than the Head of a Department. (This has been rectified since the delivery of this address).

The extent to which Section 29(1) interferes with the function of our courts remains to be considered more carefully.

The approach of South African and English courts before *Van der Linde v. Calitz*[39] was as follows. Before *Duncan v. Cammell Laird & Co. Ltd.*, given in 1942, some South African and English courts held that an objection taken by a Minister in proper form was conclusive and that only if the court was satisfied that it was frivolous or vexatious could it be refused.[40] In other cases it was, however, held that the court had a residual power, *inter alia*, to refuse the objection if there were grounds upon which to find that it was not justified in the circumstances.

In 1942, in England (and, obiously, it should be of no consequence that it was in the "darkest days of the war") it was very clearly stated in *Duncan v. Cammell Laird & Co., Ltd.* that the Minister's objection was conclusive. Subsequently English courts had misgivings regarding objections taken to the production of documents belonging to a class as opposed to contents of a particular document. In 1964 the English Court of Appeal distinguished *Duncan's* case as having been a "contents" case,[41] but in 1967 the English Court of Appeal stated that *Duncan's* case covered both "class" and "contents" cases. This was again overruled by the House of Lords in 1968.[42] It is important to note this "chopping and changing" by English courts within a period of only four years.

It should be clear, with reference to the various decisions and textbooks quoted above, that on the 30th May, 1961, the law in England was to the effect that an objection by a Minister, taken in proper form, was conclusive. It was very definitely not the law as stated by the Privy Council in 1931, in *Robinson v. State of South Australia*.

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[39]1967(2) S.A. 239 (A.D.)
[40]*Vide* Hoffmann, L. H., *The South African Law of Evidence*, (1970), p.200.
[41]*Ibid.*, and cases referred to there.
[42]*Loc. cit.*

Particular attention must be given to *S. v. Naicker and Another*.[43]

Prior to 1950, when the Privy Council ceased to be our highest Court of Appeal, the Criminal Procedure Act and the various Colonial legislative measures provided that the exclusion of evidence on the grounds of public policy (inclusive of State and public interest) had to be governed by English law, as applied in the "Courts of Westminster", or, as they have been known since the passing of the Supreme Court of Judicature Act, 1873, the "Supreme Court of Judicature".

In 1963 the reference in the Criminal Procedure Act to the "Supreme Court of Judicature in England" was amended by Section 29 of Act 92 of 1963, by substituting for the reference to English law a reference to the law as it stood on 30th May, 1961.

In *Naicker's* case the Court accepted decisions given in England after 30th May, 1961, as "explanatory" of the true English law in question. Note must be taken of the "chopping and changing" in the English courts, even after *Naicker*. What, then, would the judgment have been had the Court in *Naicker's* case been called upon to give judgment, not in 1965, but in 1967, when the courts again differed in England![44]

While I am in agreement with the view expressed by some lawyers that a decision on appeal from a decision given by a Court *a quo* in England before 30th May, 1961, could conceivably be taken into account by South African courts at the present time, it is submitted that the "explanatory" decisions given after 30th May, 1961, constitute a departure from the previously existing law in England, and are therefore not binding on our Courts, and cannot, in law, be considered. This, surely, accords with the obvious and clearly expressed intention of our Legislature. How could our Legislature anticipate the exact nature of future departures from existing law in England? To accept, as was done in *Naicker's* case, that the recent decisions in England are merely

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[43] 1965(2) S.A. 919 (N)

[44] *Cf.* Kerr, A. J.,: *Rules in the Law of Evidence which were in force 'on the Thirtieth Day of May,* 1961', S.A.L.J., 1965, p.169.

"explanatory" of the true state of the law in England, is to do violence to reality.[45] And here, on this point, *Naicker's* case cannot be reconciled with *Van der Linde v. Calitz*, in the report of which, on page 246, the following remarks of the then Chief Justice appear:

> "Genoemde bepalings van die Kaapse en Vrystaatse Ordonnansies word deur art. 44 van die Wet op Bewysleer in Siviele Sake, 1965, herroep en ingevolge art. 42 daarvan sou die tersaaklike reg wat op 30 Mei 1961 gegeld het, d.w.s. die reg wat tot op genoemde datum in die "Supreme Court of Judicature" aanwending gevind het, van toepassing bly, met die gevolg dat gewysdes van na daardie datum nie vir ons Howe van bindende gesag sou wees nie. Hierdie Wet is egter nog nie in werking gestel nie, en die bepalings van bogenoemde Ordonnansies is nog van krag."

The provisions contained in Section 42 of the Civil Proceedings Evidence Act, No. 25 of 1965, are similar to those contained in Section 29 of Act 92 of 1963; and Act 25 of 1965 came into operation on 20th June, 1967—therefore after the judgment given in *Van der Linde v. Calitz* earlier in the same year. This, of course, had the effect of putting a line through *Van der Linde v. Calitz* (with reference to State interest, and fully in accordance with the remarks of the Chief Justice quoted above). This feature was either ignored, or not appreciated, by those who, in the controversy regarding Section 29(1) of Act 101 of 1969, relied so strongly on *Van der Linde v. Calitz*.

In view of the above, the following is perhaps academic, but nevertheless interesting. It is with the greatest respect

[45]It must be "presumed", within its Interpretation of Statutes meaning, that our Legislature was aware of the state of the law in question on 30th May, 1961. It must surely also be accepted that our Legislature was not aware (as they could not have been) of the law as it would be in 1964. If our Legislature had in mind the law in England as it would be from time—by way of "explanation" or otherwise—then the reference to English law could have remained as part of our legislation. In my opinion, therefore, the reference to the law as it was on 30th May, 1961, means exactly just that. And there is nothing in the rules governing Interpretation of Statutes which, in any way, militates against such interpretation. The intention, as expressed, is crystal clear.

that it is submitted that the Court in *Van der Linde v. Calitz* erred when it "adopted" *Robinson v. State of South Australia,* given by the Privy Council in 1931, as being on a par with a decision of our own Appellate Division, and gave to it the *stare decisis* treatment—that our Appellate Division would deviate from it only if it were clearly wrong. I quote from Jean Davids' article which appeared in the South African Law Journal in 1967.[46]

> "With the greatest respect, it is submitted that this reasoning cannot be supported. Apart from questions of Roman-Dutch Law, Privy Council decisions surely were binding on our courts only in cases interpreting South African legislation, and would only be of persuasive authority in those originating from, e.g. Australia or Canada or Malta, at least where the statutes construed were not identical to ours. The Privy Council is not part of the Appellate hierarchy binding the Supreme Court of Judicature. Had the Privy Council been hearing *Van der Linde v. Calitz*, it would surely have had to look to the law as applied in the Supreme Court of Judicature, including *Duncan's* case. At best, it would have been able to consider the correctness or otherwise of the Court of Appeal's onslaughts on the unrestricted application of Lord Simon's judgment".

In addition, if at all necessary to mention it, *Van der Linde's* case concerned a civil and not a criminal issue. The Chief Justice made it clear that state security and related matters fell outside the authority of the Court, and that in such cases a Minister's objection to the admission of evidence probably would have to be taken as being conclusive. Moreover, it concerned mainly objection to the admission of documents belonging to a class of documents normally privileged—not objection to the admisson of contents of particular documents. The decision therefore covered a very limited field. Although it was found that courts had a residual power in the circumstances mentioned, it was qualified by the

[46]*State Privilege and Precedent in the Law of Evidence,* p.245, at p.249-250.

rider that a court would seldom simply overrule a properly tendered objection, and that it would not be able to do so where it was not convinced that the facts within its knowledge were decisive; which means that even in these cases envisaged by the Chief Justice, the Minister's objection to the admission of documents in evidence would, in most instances, be upheld and the Court would therefore not have all the relevant evidence before it.

But, as has been shown above, *Van der Linde* was based on a postulate which fell way with the coming into operation of the Civil Proceedings Evidence Act. Since the Chief Justice did not pertinently state what his views would have been had the said enactment been in operation at the time of judgment, we were left with the conflicting decisions of our own courts.

The preponderance of judicial opinion (including textbook writers) in England as in South Africa, on the 30th May, 1961, was to the effect that the law in question was authoritatively stated in *Duncan's* case by the House of Lords in 1942.

Immediately prior to the promulgation of Section 29(1), the law in South Africa was therefore to the effect that a properly tendered objection based on State interest had to be accepted by our Courts unless the objection was frivolous or vexatious, or possibly, that the permanent Head of the Department or Minister had not given sufficient attention to the matter.

At the most, Section 29(1) deprives the South African Courts of this very limited residual function.[47]

What should, perhaps, have attracted more attention, was that, with the coming into operation of the Civil Proceedings Evidence Act in 1967 the sources of our law of Evidence called for identification and elucidation by

[47] "At the most" since it has not been shown conclusively that the courts have been deprived of the said function. *Cf.* Hoffmann, L. M., *South African Law of Evidence* (1970), p.446. It is noteworthy that in South Africa—in terms of Section 29(1)—administrative Heads of Departments have no right to issue certificates objecting to admission of evidence. Cf. Hoffmann, *ibid.*, p.445.

our Appellate Division. However, I cannot recall any controversy regarding Sections 42 and 44 of the Civil Proceedings Evidence Act which repealed, to a large extent, the then existing civil law sources of Evidence, leaving us with *Naicker's* "explanatory" decisions given in England after 30th May, 1961, and the *obiter* remarks of the former Chief Justice in *Van der Linde v. Calitz* that such decisions could have no binding authority for South African Courts, and, in my opinion, that the sources of Evidence would henceforth be those intended by the Legislature in Section 29 of Act 92 of 1963 and Section 42 of Act 25 of 1965, namely, the law as it applied in South Africa on the 30th May, 1961, whatever its nature—good or bad.

In my opinion, therefore, Ladies and Gentlemen, it has largely been a storm in a legal teacup.

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